FILED
NOV 2 195
CHARLES ELMORE C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 398

HARRY F. MURPHY AND EARL J. BOUGHAN, TRUSTEES; MIRIAM HORN KELLEY, A WIDOW; MURIEL KELLEY RISSER, JOINED PRO FORMA BY HER HUSBAND, FRED P. RISSER; EVELYN TAYLOR KELLEY OWEN, JOINED PRO FORMA BY HER HUSBAND, ROBERT B. OWEN; JOHN EDGAR KELLEY, A MINOR, BY HIS NEXT FRIEND, ROBERT B. OWEN; AND EDNA D. KELLEY, A WIDOW,

vs. *Petitioners,*

MAY KELLEY SCHNEIDER, A WIDOW,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

OSCAR D. MCCOLLUM,
1337 Rialto Building,
Kansas City, Missouri;
ROY W. CRIMM,
807 Midland Building,
Kansas City, Missouri;
STONE AND STONE,
712 Barfield Building,
Amarillo, Texas;
Attorneys for Petitioners.

D. H. CULTON,
611-618 Barfield Building,
Amarillo, Texas,
Counsel for Petitioners.

INDEX

Petition for Writ of Certiorari

	Page
I. Questions Presented	2
II. Reasons Relied on for Allowance of Writ	2
III. Basis of Jurisdiction	3
IV. Statement of Matter Involved	3
V. Prayer	7

Brief in Support of Petition for Writ of Certiorari

Statement 8

On Question 1. 8

The holding of the Court of Appeals for the Fifth Circuit that May Kelley Schneider conveyed her estate in the land in controversy by an oral acceptance of the deed from Charles H. Henderson purporting to convey all the land to Arthur B. Kelley and May Kelley Schneider for their joint lives with remainder to the survivor is in conflict with the law of Texas as enacted by Article 1288, revised Civil Statutes of the State of Texas, Revision of 1925, reading, in part:

"No estate of inheritance or freehold, . . ., in lands and tenements, shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same . . .".

On Question 2. 12

The holding of the Court of Appeals for the Fifth Circuit that the oral acceptance of the Henderson deed was "in legal effect the same as an execution thereof" by May Kelley Schneider is in conflict with the law of Texas as declared by the applicable local decisions 12

Page

On Question 3. 13

The holding of the Court of Appeals for the Fifth Circuit that the equitable title of Arthur B. Kelley in the land passed by virtue of the Henderson deeds is in conflict with the law of Texas as declared by the applicable local decisions that a conveyance not intended as a gift, for which there was no consideration, does not pass equitable title 13

Conclusion 17

Prayer 17

Table of Cases

American Nat. Ins. Co. v. *Warnock*, 131 Tex. 457, 114 S. W. (2d) 1161 12

Bibby v. *Bibby*, 114 S. W. (2d) 284 10

Binford v. *Snyder*, 144 Tex. 134, 189 S. W. (2d) 471 14

Clegg v. *Brannan*, 111 Tex. 367, 234 S. W. 1076 12

Colden v. *Alexander*, 141 Tex. 134, 171 S. W. (2d) 328 8

Fretellie v. *Hindes*, 57 Tex. 392 13

Greene v. *White*, 137 Tex. 561, 153 S. W. (2d) 575 10

Hamilton v. *First Nat. Bank of O'Donnell*, 155 S. W. (2d) 626 15

In re Rosenberg, 4 F. (2d) 581 15

McAnally v. *Texas Co.*, 124 Tex. 196, 76 S. W. (2d) 997 9

Shannon v. *Shannon*, 231 S. W. (2d) 986 14, 15

Southern Pine Lumber Co. v. *Arnold*, 139 S. W. 917 9

Text Books and Statutes

Article 1288, Revised Civil Statutes of Texas, Revision of 1925 9

42 Texas Jurisprudence, P. 643, Trusts, Sec. 40 14

42 Texas Jurisprudence, P. 680, Trusts, Sec. 70 14

28 U.S.C., Sec. 1254, Subd. (1) 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 398

HARRY F. MURPHY AND EARL J. BOUGHAN, TRUSTEES; MIRIAM HORN KELLEY, A WIDOW; MURIEL KELLEY RISSER, JOINED PRO FORMA BY HER HUSBAND, FRED P. RISSER; EVELYN TAYLOR KELLEY OWEN, JOINED PRO FORMA BY HER HUSBAND, ROBERT B. OWEN; JOHN EDGAR KELLEY, A MINOR, BY HIS NEXT FRIEND, ROBERT B. OWEN; AND EDNA D. KELLEY, A WIDOW,

vs. *Petitioners,*

MAY KELLEY SCHNEIDER, A WIDOW,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit in Cause No. 12951 on the docket of that Court.

Questions Presented

1

THE HOLDING OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT MAY KELLEY SCHNEIDER CONVEYED HER ESTATE IN THE LAND IN CONTROVERSY BY AN ORAL ACCEPTANCE OF THE DEED FROM CHARLES H. HENDERSON PURPORTED TO CONVEY ALL THE LAND TO ARTHUR B. KELLEY AND MAY KELLEY SCHNEIDER FOR THEIR JOINT LIVES WITH REMAINDER TO THE SURVIVOR IS IN CONFLICT WITH THE LAW OF TEXAS AS ENACTED BY ARTICLE 1288, REVISED CIVIL STATUTES OF THE STATE OF TEXAS, REVISED OF 1925, READING, IN PART:

> "NO ESTATE OF INHERITANCE OR FREEHOLD, . . . IN LANDS AND TENEMENTS, SHALL BE CONVEYED FROM ONE TO ANOTHER, UNLESS THE CONVEYANCE BE DECLARED BY AN INSTRUMENT IN WRITING, SUBSCRIBED AND DELIVERED BY THE PARTY DISPOSING OF THE SAME, . . ."

2

THE HOLDING OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT THE ORAL ACCEPTANCE OF THE HENDERSON DEED WAS "IN LEGAL EFFECT THE SAME AS AN EXECUTION THEREOF" BY MAY KELLEY SCHNEIDER IS IN CONFLICT WITH THE LAW OF TEXAS AS DECLARED BY THE APPLICABLE LOCAL DECISIONS.

3

THE HOLDING OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT THE EQUITABLE TITLE OF ARTHUR B. KELLEY IN THE LAND PASSED BY VIRTUE OF THE HENDERSON DEEDS IS IN CONFLICT WITH THE LAW OF TEXAS AS DECLARED BY THE APPLICABLE LOCAL DECISIONS THAT A CONVEYANCE NOT INTENDED AS A GIFT, FOR WHICH THERE WAS NO CONSIDERATION, DOES NOT PASS EQUITABLE TITLE.

II

Reasons Relied On for Allowance of the Writ

In each of the Questions Presented the Court of Appeals for the Fifth Circuit has decided an important question of

local law in a way to conflict with applicable local decisions and statutes, precedents, and long settled Rules of Property of long standing in the State of Texas relating to the title to land and the conveyance thereof.

In deciding the foregoing Questions the Court of Appeals for the Fifth Circuit has not applied the law of Texas by which it is bound. On the other hand, the Court has applied what might be the law of other states than Texas, thus depriving Petitioners of land in Texas which belongs to them under the law of Texas.

III

Basis of Jurisdiction

The jurisdiction of the Supreme Court is based on Title 28 U. S. C., Section 1254, Subdivision (1). The judgment of the United States Court of Appeals for the Fifth Circuit, which Petitioners herein seek to have reviewed, was rendered on August 5, 1950 (R. 903) and the order of the Court denying petition for rehearing was entered on September 20, 1950 (R. 947). The opinion of the Court of Appeals appears in the Record on Pages 893 to 909 and is reported in 183 F. (2d) 777.

IV

Statement of Matter Involved

This action was instituted by Petitioners in the District Court of the United States for the Northern District of Texas, Amarillo Division, against Respondent to impress a trust upon an aggregate of 53.667% undivided interest in 4,480 acres of land in Ochiltree County, Texas.

It is not controverted that on March 27, 1937, the legal title to the lands involved was vested in Arthur B. Kelley; an undivided one-sixth interest in the equitable title in his

brother, John M. Kelley; an undivided one third interest in the equitable title to his sister, May Kelley Schneider; and an undivided one half interest in the equitable title to himself, Arthur B. Kelley, all of such interests, both legal and equitable, having been created by and evidenced by instruments in writing.

The controlling Findings of Fact are:

Finding No. 10 (R. 114, 115) that Arthur B. Kelley, at all times material hereto, "knew and recognized that his brother John M. Kelley owned an undivided interest in the equitable title to the land and premises in controversy" and knew and recognized that his sister, May Kelley Schneider, likewise owned an undivided interest in the equitable title to the land in controversy;

Finding No. 11 (R. 115) that Respondent, May Kelley Schneider, knew that the lands were trust properties and knew that her brother, John M. Kelley, like herself, had acquired by devise from their mother and from their sister, Harriett, an equitable title to an undivided interest in the land;

Finding No. 12 (R. 115) reading:

> "On March 27, 1937, Arthur B. Kelley, then a single man, executed a warranty deed dated March 18, 1937, which in form purported to convey for a recited consideration of one dollar all of the land and premises in controversy to one Charles H. Henderson, a long time employee of Arthur B. Kelley and of his family. Upon the same date Charles H. Henderson executed a warranty deed dated March 19, 1937, which in form, for a recited consideration of one dollar, purported to convey all of the land and premises in controversy to Arthur B. Kelley and May Kelley Schneider for the period of their joint lives with remainder to the survivor, his or her heirs. These deeds were each filed for record in Ochiltree County, Texas, on April 3, 1937, and duly recorded in the Deed Records in such county.";

Finding No. 13 (R. 116) reading:

"No consideration whatever passed from Charles H. Henderson to Arthur B. Kelley for such deed to Charles H. Henderson.";

Finding No. 14 (R. 116) reading:

"No consideration whatever passed between May Kelley Schneider and Arthur B. Kelley to Charles H. Henderson for the deed from him to Arthur B. Kelley and May Kelley Schneider.";

Finding No. 15 (R. 116) reading:

"No consideration whatever passed from May Kelley Schneider to Arthur B. Kelley for any of the deeds above described.";

Findings Nos. 16 and 17 (R. 116) that no gift was intended in the Henderson deed transaction, and none made;

Finding No. 18 (R. 116) that the intent and purpose of Arthur B. Kelley in the Henderson deed transaction was to have two trustees for the land with right of survivorship;

Finding No. 25 (R. 117, 118) that Arthur B. Kelley died May 10, 1943; and

Finding No. 26 (R. 118) that after the death of Arthur B. Kelley, May Kelley Schneider claimed all of the land as her own.

Based upon the above controlling Findings the trial court concluded (Conclusions Nos. 6, 10 and 11, R. 123, 124) that the deeds referred to in Finding No. 11 (and herein as the Henderson deeds) passed no equitable title to the land and that by virtue of such deeds Arthur B. Kelley and May Kelley Schneider became vested with legal title only as joint tenants with right of survivorship as trustees for the owners of the equitable title as tenants in common, and entered a judgment accordingly.

The Circuit Court characterized the Findings of Fact of the trial court as "full and complete" (R. 899) and ex-

pressly stated that there was no occasion for determining whether, as facts, the Findings were clearly erroneous (R. 901). The Circuit Court did not set aside as determining the facts any of the Findings. As determining the facts of this controversy the Findings of Fact of the trial court stand.

The Court of Appeals, Fifth Circuit, held (R. 902): "The acceptance of this deed being in legal effect the same as an execution thereof, it likewise, as to May Kelley Schneider, evidenced a disposition of her equitable estate made, and to be made in the future, in accordance with the terms of the instrument"; that the Henderson deeds on their face thus evidenced a consideration moving from Respondent to Arthur B. Kelley in the form of the conveyance by her to Arthur B. Kelley of her interest in the land (R. 902); and (R. 902) "Therefore, the finding by the Court of no consideration,—is not legally material", so that the equitable title of Arthur B. Kelley was held to have passed under the Henderson deeds.

While the Henderson deeds on their face purported to convey all of the land in controversy, without any exception as to John M. Kelley's then interest therein, the Court of Appeals held that in law and under concession of Respondent made in the Court of Appeals (R. 897) one-sixth interest in the equitable title to the land rightfully belongs to the trustees of John M. Kelley, but that the devisees of Arthur B. Kelley, except Respondent, had no interest in the land, and reversed and remanded the judgment of the trial court with instructions to enter judgment declaring the ownership of the land as above set forth.

V

Prayer

WHEREFORE, Petitioners respectfully pray that writ of certiorari to the United States Court of Appeals for the Fifth Circuit be issued herein, and that this Honorable Court review the decision of the United States Court of Appeals for the Fifth Circuit rendered herein and finally reverse it and affirm the judgment of the trial court.

Respectfully submitted,

OSCAR D. MCCOLLUM,
1337 Rialto Building,
Kansas City, Missouri;
ROY W. CRIMM,
807 Midland Building,
Kansas City, Missouri;
STONE AND STONE,
712 Barfield Building,
Amarillo, Texas,
Attorneys for Petitioners.

D. H. CULTON,
611-618 Barfield Building,
Amarillo, Texas,
Counsel for Petitioners.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement

Petitioners here adopt the Statement of Matter Involved contained in the foregoing Petition for Writ of Certiorari.

Since the land in controversy is situated in Texas the title to it is determined exclusively by the law of Texas. *Colden* v. *Alexander* (S. Ct., Tex., 1943), 141 Tex. 134, 171 S. W. (2d) 328 at Pages 335 and 336, and authorities there cited.

On Question 1

THE HOLDING OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT MAY KELLEY SCHNEIDER CONVEYED HER ESTATE IN THE LAND IN CONTROVERSY BY AN ORAL ACCEPTANCE OF THE DEED FROM CHARLES H. HENDERSON PURPORTING TO CONVEY ALL THE LAND TO ARTHUR B. KELLEY AND MAY KELLEY SCHNEIDER FOR THEIR JOINT LIVES WITH REMAINDER TO THE SURVIVOR IS IN CONFLICT WITH THE LAW OF TEXAS AS ENACTED BY ARTICLE 1288, REVISED CIVIL STATUTES OF THE STATE OF TEXAS, REVISION OF 1925, READING, IN PART:

> "NO ESTATE OF INHERITANCE OR FREEHOLD, . . ., IN LANDS AND TENEMENTS, SHALL BE CONVEYED FROM ONE TO ANOTHER, UNLESS THE CONVEYANCE BE DECLARED BY AN INSTRUMENT IN WRITING, SUBSCRIBED AND DELIVERED BY THE PARTY DISPOSING OF THE SAME, . . .".

Under the decision of the Circuit Court herein a trustee may appropriate for himself trust property of the beneficiary without the beneficiary even knowing anything had happened. All the trustee would have to do would be to execute a deed conveying the trust land to the beneficiary and by exception contained in the deed except or reserve all

minerals and file the conveyance for record. The recording of the deed would raise the presumption that it was filed for record by the grantee and that the grantee accepted it (*McAnally* v. *Texas Co.* (S. Ct., Tex., 1934), 124 Tex. 196, 76 S. W. (2d) 997 at Page 1000). Under the decision of the Circuit Court the trustee would have acquired title to the mineral interest in the land. The burden would be upon the beneficiary in the trust to protect himself from the wrongful efforts of the trustee to acquire the trust property.

Article 1288 of the Revised Civil Statutes of Texas, Revision of 1925, reads, in full, as follows:

> "No estate of inheritance or freehold, or for a term of more than one year, in lands and tenements, shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or by his agent thereunto authorized by writing."

This article is not a statute of frauds and forms no part of the Statute of Frauds of Texas. On the contrary, it is headed "Instrument of Conveyance" and is a part of Title 31 of the Revised Statutes of Texas, 1925 Revision, headed "Conveyances". It is a rule of substantive law prohibiting conveyances of land except by instrument in writing "subscribed and delivered by the party disposing of the same—". Under the article a conveyance not signed by the party disposing of the land is of no legal effect whatever. Upon the statute the court in *Southern Pine Lumber Co.* v. *Arnold* (T. C. A., Texas), 139 S. W. 917, said at Page 922:

> "The affixing of the signature to an instrument is a written assent to the contents, and that is what the statute intends shall be done when one conveys land, or creates an agency to convey."

May Kelley Schneider subscribed her name to nothing. She delivered nothing.

The Circuit Court for the Fifth Circuit, in deciding the question here considered, cited only the Texas case *Greene* v. *White*, 137 Tex. 561, 153 S. W. (2d) 575. The Supreme Court of Texas in *Greene* v. *White* expressly held (153 S. W. (2d) at Page 583) that the grantee in the deed involved there "*further became a party to the deed and contract by executing the vendor's lien notes given as purchase money*". In that case the grantee did give the "written assent to the contents" of the instrument that the "statute intends shall be done when one conveys land".

In *Greene* v. *White* the Supreme Court of Texas did not hold that the acceptance of a deed could operate to divest the grantee of an interest in land he had theretofore owned but held to the contrary that if, at the time of the execution and delivery of the deed there involved from Greene to Garrett, Garrett already owned the land "the deed was not effective to convey anything" and "did not have the effect of reserving minerals to Greene" and "could not operate * * * to reserve any kind of title to any timber estate thereon or to any mineral estate therein—" (153 S. W. (2d) at Page 587).

We respectfully submit that there are no Texas decisions holding that the acceptance of a deed divests the grantee of any previously owned interest in the land unless such acceptance is evidenced by an instrument in writing subscribed by the grantee.

The language of the court in *Bibby* v. *Bibby* (T. C. A., El Paso, 1938), 114 S. W. (2d) 284 at Page 286, is material to this controversy:

> "It is settled law that the manual delivery of a deed by the grantor will not operate to pass title unless such delivery was accompanied by an intention on the part of the grantor to invest the grantee with the title; and where the conveyance is based upon an onerous consideration, it is also necessary to show the grantee

> accepted the conveyance. The controlling question upon both of these issues is the intention of the parties. Taylor v. Sanford, 108 Tex. 340, 193 S. W. 661, 5 A. L. R. 1660; Hubbard v. Cox, 76 Tex. 239, 13 S. W. 170; Tyler B. & L. Ass'n v. Baird & Seales, Tex. Civ. App., 165 S. W. 542".

Thus, the acceptance of a correction deed describing different property from that described in an original deed establishes that the original deed was not delivered or accepted with the intent that the title pass to the property therein described. The grantee never owned it. By such a correction deed the grantor does not acquire an interest in the grantee's property.

If May Kelley Schneider intended to divest herself of an estate of inheritance in real property, which she knew was evidenced by instruments in writing, why was some written record of that intention not made? If Arthur B. Kelley, the trustee, had been the survivor and had asserted ownership to all of the land, how successful would he have been, upon the facts here, in asserting that May Kelley Schneider, the beneficiary, conveyed her interest in the land to him by accepting the deed from Henderson? A court would have rejected his claim with disgust and indignation. Clearly, the heirs or devisees of Mrs. Schneider could have recovered their interest in the trust property because Mrs. Schneider was not divested of any of her undivided interest in the equitable title to the land in controversy by virtue of the Henderson transaction. The Findings of Fact of the trial court that there was no consideration whatever passing between any of the parties to the Henderson deeds are, therefore, correct and legally material to this controversy.

On Question 2

THE HOLDING OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT THE ORAL ACCEPTANCE OF THE HENDERSON DEED WAS "IN LEGAL EFFECT THE SAME AS AN EXECUTION THEREOF" BY MAY KELLEY SCHNEIDER IS IN CONFLICT WITH THE LAW OF TEXAS AS DECLARED BY THE APPLICABLE LOCAL DECISIONS.

The Circuit Court cites no authority whatever for its holding that the acceptance of the Henderson deed was "in legal effect the same as an execution thereof".

Whatever the law of other states might be, under the laws of Texas the acceptance of an instrument in writing is not "in legal effect the same as an execution thereof". This was expressly decided by the Supreme Court of Texas in *Clegg* v. *Brannan,* 111 Tex. 367, 234 S. W. 1076, in the following language:

> "Plaintiff in error contends that he was bound by Brannan's written contract because he accepted it, and that it was accepted by them as binding upon both. *The acceptance of a contract in writing is not equivalent to signing it.*" (Emphasis ours.)

And in *American Nat. Ins. Co.* v. *Warnock,* 131 Tex. 457, 114 S. W. (2d) 1161, at Page 1164:

> "* * * in the case of an offer to buy or sell land, the acceptance must be in writing. * * *"

The Supreme Court of Texas in *Greene* v. *White, supra,* nowhere says or holds that the acceptance of a deed is in legal effect the same as an execution of it. In truth, the Supreme Court of Texas in *Greene* v. *White* expressly held that the grantee in the deed "became a party to the deed and contract by executing the vendor's lien notes given as purchase money".

Article 1288 of the Revised Statutes of Texas prohibits the conveyance of land except by instrument in writing

"subscribed and delivered by the party disposing of the same". There is no room in the statute for the equivalent of a signature. It is the signature itself which is required.

On Question 3

THE HOLDING OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT THE EQUITABLE TITLE OF ARTHUR B. KELLEY IN THE LAND PASSED BY VIRTUE OF THE HENDERSON DEEDS IS IN CONFLICT WITH THE LAW OF TEXAS AS DECLARED BY THE APPLICABLE LOCAL DECISIONS THAT A CONVEYANCE NOT INTENDED AS A GIFT, FOR WHICH THERE WAS NO CONSIDERATION, DOES NOT PASS EQUITABLE TITLE.

The recited consideration in the Henderson deeds is $1.00 cash (Finding 12, R. 115). The well-known, natural and universal manner in which two trustees hold property as trustees is with a right of survivorship. The Henderson deed, in which the right of survivorship is provided, is entirely consistent with the conclusion that Arthur B. Kelley and May Kelley Schneider held the legal title as trustees for the owners of the equitable title. The deed, therefore, does not define the interest of Arthur B. Kelley and May Kelley Schneider in the equitable title to the land any more than any other deed which is absolute upon its face. In *Fretelliere* v. *Hindes, et al.*, 57 Tex. 392, 393, the Supreme Court of Texas in 1882 confirmed the then already settled law in Texas by the following language:

> "That parol evidence is admissible to prove that a deed, absolute upon its face, was executed upon trusts not reduced to writing, and to prove a resulting trust, is not an open question in this court."

There being no contractual consideration recited in the Henderson deeds, it is well settled, under the law of Texas, that parol evidence is admissible to prove that no consideration passed for the deeds even though consideration is

recited therein and to prove facts which would raise a resulting trust. *Binford* v. *Snyder* (S. Ct., Tex., 1945), 144 Tex. 134, 189 S. W. (2d) 471; *Shannon* v. *Shannon* (T. C. A., Amarillo, 1950), 231 S. W. (2d) 986; 42 *Texas Jurisprudence,* P. 680, Trusts, Sec. 70.

The law of Texas is clearly stated in 42 *Texas Jurisprudence,* P. 643, Trusts, Sec. 40:

> "Conveyance Without Consideration.—Where, without receiving any consideration and with no intention to make a gift, A transfers property to B a trust results to A, although there is no proof that B agreed to hold the property in trust. If a promise to reconvey is proved, B will hold the property under an express trust; but the absence of any such agreement does not negative the conclusion of equity that a trust results from the mere fact that the property is conveyed without the passing of consideration and without any intention to make a gift."

The Supreme Court of Texas in *Binford* v. *Snyder, supra,* expressly held that an absolute deed which contained neither a written expression or any other evidence of any reservation of equitable title passed to the grantee only the legal title; that a trust resulted to the grantor because there was no consideration for the conveyance and no gift intended; and that equitable title remained in the grantor. The words of the Supreme Court appearing in 189 S. W. (2d) at Page 472 are:

> "Therefore, when she conveyed her property to him without consideration and there being no blood relationship existing between them, no intention of making a gift appears. A trust resulted to Mrs. Snyder, and whether the trust be an express or an implied one is immaterial, for the reason that in either class the equitable title to the property is in the actual owner and the legal title is in the trustee. We conclude, therefore, that as between Mrs. Snyder and E. C. Carnes

the equitable fee in the land sought to be recovered in this suit is in Mrs. Snyder."

In *Hamilton* v. *First Nat. Bank of O'Donnell* (T. C. A. 1941), 155 S. W. (2d) 626, 630, the court said:

> "* * * It has long been the established rule of equity in this and many other jurisdictions that where a grantor, without consideration, conveys property to a grantee, under circumstances that do not constitute a gift, a resulting trust arises. Under such circumstances equity presumes an intention of the parties that the beneficial title is to remain in the grantor and the grantee holds the same for his benefit. Solether et al. v. Trinity Fire Ins. Co., 124 Tex. 363, 78 S. W. 2d 180; Jopling v. Caldwell-Dengenhardt, Tex. Civ. App., 292 S. W. 958, reversed on other grounds, Benton Land Co. v. Jopling, Tex. Com. App., 300 S. W. 28; Abilene State Bank v. Donnelly, Tex. Civ. App., 277 S. W. 447; Wise v. Cecil, Tex. Civ. App., 135 S. W. 2d 235."

The same rule of law was expressly followed by the Court of Civil Appeals of Texas at Amarillo in *Shannon* v. *Shannon* (June 26, 1950), 231 S.W. (2d) 986 at Page 989.

The law of Texas is clearly stated by the court in *In re Rosenberg* (D.C., Tex., 1925), 4 F. (2d) 581, 582, speaking through Judge Hutcheson, now Chief Judge for the United States Court of Appeals for the Fifth Circuit, that:

> "* * * Where for any reason the legal title to property is placed in one person under such circumstances as to make it inequitable for him to enjoy the beneficial interest, equity will imply a trust in favor of the person entitled to the beneficial interest, is settled by overwhelming authority. * * *"

May Kelley Schneider knew that she had given no consideration for the Henderson deeds (Findings 13, 14 & 16, R. 116). She knew that Arthur B. Kelley had not given

his interest in the land to her (Findings 16 & 17, R. 116) and she knew that she had not acquired the interest of her brother, John (Finding 11, R. 115). She knew that she and Arthur held the property as trustees for herself, her brother Arthur, and her brother John. When she found herself in a position where she thought she could appropriate all the land for herself to the exclusion of her brother John, and the widow and devisees of her brother Arthur, except herself, she determined to do so. Shortly after Arthur's death she declared: "I have the deeds to this property and it is mine." (R. 545) and even went so far as to deny that Arthur ever held the property in trust (R. 768, 769, 692-695).

The Circuit Court, though permitting the facts as found by the trial court to stand (R. 901), by its superficial view of the case, by taking the Henderson deeds solely upon their face and by failing to look behind the deeds, as required to do by the law of Texas, has allowed May Kelley Schneider to prevail in her selfish and dishonest scheme, thus making mockery of the law of Texas.

From the above decisions of the courts of Texas it is clear that Conclusion of Law No. 6 (R. 123) of the trial court that no equitable title passed from Arthur B. Kelley to Charles H. Henderson, the conduit, and Conclusion of Law No. 10 (R. 123) that no equitable title passed by the deed from Charles H. Henderson to Arthur B. Kelley and May Kelley Schneider, and Conclusion of Law No. 11 (R. 124) that by the Henderson deeds legal title only became vested in Arthur B. Kelley and May Kelley Schneider as trustees for Arthur B. Kelley, May Kelley Schneider and John M. Kelley, the owners of the equitable title, as tenants in common, is correct, and that the decision of the Circuit Court to the contrary is in conflict with the applicable decisions of the courts of Texas.

Conclusion

We submit that the Court of Appeals for the Fifth Circuit in deciding this controversy did not follow the clear and well-established law of the State of Texas applicable to the ownership of land in Texas and the conveyance thereof, by which it is bound, and that the Petitioners have, by the judgment of the Court of Appeals for the Fifth Circuit, been deprived of land in Texas which belongs to them under the law of Texas.

Prayer

WHEREFORE, Petitioners respectfully pray as in their Petition for Writ of Certiorari.

Respectfully submitted,

OSCAR D. MCCOLLUM,
1337 Rialto Building,
Kansas City, Missouri;
ROY W. CRIMM,
807 Midland Building,
Kansas City, Missouri;
STONE AND STONE,
712 Barfield Building,
Amarillo, Texas,
Attorneys for Petitioners.

D. H. CULTON,
611-618 Barfield Building,
Amarillo, Texas,
Counsel for Petitioners.